Supreme Court, U.S.
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In The

Supreme Court of the United States

MARTHA DEAN,

Petitioner,

v.

RICHARD BLUMENTHAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

MARTHA A. DEAN
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Petitioner

QUESTIONS PRESENTED

1. Whether a candidate for political office has a First Amendment right to raise campaign funds free from governmentally-imposed limits that do not withstand the test of strict scrutiny.

2. Whether the ban imposed by Mr. Blumenthal on contributions to any candidate running for Attorney General meets the standard applicable to evaluating the constitutionality of governmentally-imposed limits on political contributions to a candidate's campaign.

3. Whether the "general contours" of candidate Dean's right to raise campaign funds free from the type of contribution ban that Mr. Blumenthal imposed on potential contributors to her campaign was clearly established in 2002, thereby barring any defense of qualified immunity.

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OPINIONS AND ORDERS BELOW

The decision of the court of appeals is reported at 577 F.3d 60 (2nd Cir. 2009). The opinion of the district court is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was filed on August 11, 2009. Plaintiff's Petition for Rehearing en banc was denied on November 3, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I, § 1.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; . . . ." U.S. Const. amend. 14, § 1.

42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Conn. Gen. Stat. § 9-612 (2009) is set out in full in the Appendix to the petition. App. 26-44.

STATEMENT OF THE CASE

This is a First Amendment challenge, under 42 U.S.C. § 1983, to an absolute ban on campaign contributions, which was instituted by the Connecticut

Attorney General Richard Blumenthal and imposed on certain large groups of individuals, to any candidate for Connecticut Attorney General.

Mr. Blumenthal was first elected Attorney General of the State of Connecticut in 1990. Compl. ¶ 6. On or about July 1996, the reelected Attorney General Blumenthal awarded an unprecedented contingency fee contract to his former law partner, David Golub, and Mr. Golub's wife for Mr. Blumenthal's proposed litigation against the tobacco companies. Compl. ¶ 25.

The Attorney General awarded the contingency fee tobacco litigation contract without legislative approval, for which he was criticized. Some claimed a contingency fee award of money owed to the State is an appropriation that the Attorney General cannot make on his own. Others criticized the Attorney General for engaging his former law partner and law partner's wife without a public bidding process, ignoring entirely highly-qualified attorneys and law firms.

Mr. Blumenthal bound the State to pay 25% of any award to the State in the tobacco litigation principally to Mr. Blumenthal's former partner and partner's wife.

In close timing with the controversy over Mr. Blumenthal's award of an unprecedented and lucrative state contract to his former law partner and law partner's wife, the Attorney General inserted into all state contracts with law firms language that imposed a complete ban on contributions to candidates for Attorney General. Mr. Blumenthal

issued letters that stated that he interpreted the ban to apply to attorneys, their spouses, and their legal staff at law firms doing business with the State. App. 54, App. 47 (Dean Aff. ¶ 12). Leading up to the Attorney General's ban, there was no public discussion or debate of corruption involving attorney general candidates and campaign contributions. The only criticism of potential corruption stemmed from Mr. Blumenthal's own act of awarding the lucrative tobacco fee agreement to Mr. Golub and his wife.

The Attorney General's campaign filings reveal that, when Mr. Blumenthal's ban was first imposed in 1996, Mr. Blumenthal himself had already reaped the benefit in 1990 of winning the office by accepting contributions from partners at the very law firms to which he would later award state contracts. App. 47-48 (Dean Aff. ¶ 13); Compl. ¶ 24. As of 1996, when Mr. Blumenthal first instituted his self-styled ban on contributions to all candidates for attorney general, it was still years before Connecticut's large-scale public corruption scandals would come to light.

Just two years later, in 1998, Mr. Blumenthal settled the litigation with the tobacco companies. The contingency fee award owed by the State to Mr. Golub and Mr. Golub's wife principally was calculated at $900 million. The award was later reduced to $65 million amounting to what would be compensation for the legal work of a partner, billed at today's market-based hourly rates, working nonstop 40 billable hours a week, for 125 years. Compl. ¶ 25. The ultimate distribution of public funds among Mr. Blumenthal's

friends occurred behind closed doors, in private arbitration, and without public scrutiny.

The contingency fee award to Mr. Blumenthal's former partner and former partner's wife generated public controversy because of Mr. Blumenthal's relationship to the recipients, the unprecedented terms of the state contract for legal services, and the fact that, reportedly, law firms with significant experience in bringing such a case could not get interviews for the work with Mr. Blumenthal's office.

In 2002, Martha Dean became the Republican nominee for the office of Connecticut Attorney General. Late in the campaign, Dean first learned from would-be contributors that Attorney General Blumenthal had tied their hands by contract and banned them entirely from contributing to her campaign. Dean also learned that, approximately two months prior, the Attorney General had issued a letter to the affected law firms stating that he interprets the ban to cover spouses of the prohibited class members, which class included law firm associates and other staff exercising discretionary authority. App. 47 (Dean Aff. ¶ 12); App. 54. The letter made clear that the affected lawyers, spouses, and legal staff were prohibited entirely from contributing to Dean's campaign. App. 54.

At the time of the 2002 race for the office of attorney general, the contract language read:

> No partner, owner, director and/or employee, with managerial and/or discretionary

> authority, of the COUNSEL may directly or indirectly make financial donations to any candidate for the Office of the Attorney General of the State of Connecticut during the course of the agreement.

App. 49.

The Attorney General's extraordinary and sweeping ban on campaign contributions to political opponents challenging him for office severely impacted candidate Dean's efforts to amass the resources necessary to mount an effective campaign for attorney general. App. 45-48 (Dean Aff. ¶¶ 4-10, 14). Many of Dean's colleagues, friends, and political supporters worked at the large number of law firms under contract with the State or were married to partners or employees at these same firms.

On October 25, 2002, Dean commenced this action pursuant to § 1983 of Title 42 and §§ 1331 and 1343(3) of Title 28 of the United States Code. Compl. ¶ 1, 2. On November 18, 2002, Mr. Blumenthal filed a 12(b)(1) motion to dismiss, arguing that candidates lack Article III standing because, according to the Attorney General, they do not have a First Amendment right to receive contributions.

Approximately one week prior to the 2002 election, Mr. Blumenthal issued a letter to the law firms affected by the ban temporarily suspending the ban on contributions for the week remaining in the election cycle. In the same letter, the Attorney

General declared that he intended to enforce the ban going forward provided it was upheld.

At about this same time, a review of publicly-available records filed by Mr. Blumenthal in connection with his three (at that time) successful campaigns for the office of Attorney General revealed: hundreds of instances in multiple election cycles where the Blumenthal campaign failed to obtain enough information from contributors to know whether the contributor was covered by the Attorney General's ban; large numbers of contributions to Mr. Blumenthal from key law partners at law firms that were subject to the ban even though the ban was in effect at the time of the contribution; and, in his filing for his original 1990 run for Attorney General, large numbers of contributions to Mr. Blumenthal from partners in law firms that would later receive contracts with the attorney general's office or with other divisions of state government. App. 47-48 (Dean Aff. ¶ 3).

On April 17, 2003, the district court stayed discovery. Despite candidate Dean's efforts to press forward with the litigation and permanently eliminate the offending restriction on fundraising, this case was stalled by the district court for nearly four years.

In 2006, the Republican nominee for Attorney General, Robert Farr, joined this action challenging Mr. Blumenthal's ban under the First Amendment as a co-plaintiff. Mr. Farr experienced a particularly

harsh effect of the Attorney General's ban on contributions when he learned that it prohibited Farr's own wife, a partner at one of the law firms subject to the ban, from contributing to her husband's campaign.

Between 2002 and 2006, the Attorney General's Office modified the ban's language in the State's contracts with law firms to read as follows:

> No partner, owner, director and/or employee, with managerial and/or discretionary authority, of the COUNSEL may directly or indirectly make financial donations to any candidate for the Office of the Attorney General of the State of Connecticut during the course of the agreement except that this paragraph shall not be effective until and unless litigation now pending in the United States District Court for the District of Connecticut is resolved in a manner which does no [sic] affect the validity of this provision.

On September 18, 2006, the Attorney General's office issued another letter to law firms doing business with Connecticut, providing further insight into Mr. Blumenthal's intentions to enforce his ban:

> On June 2, 2006, I wrote to inform you that this office would continue to suspend [my ban on contributions to Attorney General candidates] pending a final ruling, including any appeals, on the case referenced above, and would enforce the provision only prospectively if it is finally upheld. I now write to inform you that this contract

> provision regarding contributions to candidates for Attorney General will remain suspended, and will not be enforced in any way, through this election cycle.
>
> Effective December 31, 2006, the contractual policy will be wholly and permanently superseded by the campaign contribution provisions of Connecticut General Statutes Section 9-333n, as amended by Public Act 05-05, which takes effect on that date.

On September 18, 2006, the district court granted the Attorney General's motion to dismiss on the grounds asserted by Mr. Blumenthal: that a candidate for public office does not have a First Amendment right to receive campaign contributions. The district court held that Dean lacked Article III standing because she was a candidate who was only "affected indirectly" by the Attorney General's ban. Dean appealed.

In February 2007, Governor M. Jodi Rell appointed co-plaintiff Farr to the State Board of Pardons and Paroles as Chairman. On April 9, 2007, Mr. Farr was dismissed voluntarily from Dean's action against Mr. Blumenthal.

On August 11, 2009, almost seven years after Dean commenced this case, the appellate court held that the district court, in dismissing Dean's case, "erroneously conflated the requirement for an injury in fact with the constitutional validity of Dean's claim." App. 12, n.4. The appellate court held that under the correct legal analysis, Dean has standing to

bring her action for injunctive and declaratory relief, *id.*, but that after six years the claims had become moot. App. 10. On the other hand, the court held, Dean's claims for damages are not moot. App. 12. Even so, the appellate court reasoned, Dean's damages claims must be dismissed on the ground that Mr. Blumenthal is protected from such claims under the doctrine of qualified immunity. App. 21. The affirmative defense of qualified immunity was never plead, briefed, or argued and was raised for the first time by the court, *sua sponte*, at oral argument on appeal. App. 13-14, n.6. At the conclusion of oral argument, Mr. Blumenthal's counsel expressly reserved the right of the Attorney General to institute similar bans on contributions by contract in the future.

On September 22, 2009, Dean filed a timely request for rehearing *en banc*. The appellate court denied the request on November 3, 2009. App. 24.

On January 6, 2010, the Attorney General announced publicly that he will not seek reelection at the end of his term expiring at the end of 2010 because he is seeking the office of United States Senator.

On January 13, 2010, the Second Circuit heard argument on challenges to the constitutionality of Connecticut's statute providing for public financing of elections and campaign finance reform, C.G.S. § 9-612(g)(2). The statute under attack is the very statute that Mr. Blumenthal claimed in letters to law firms would effectively replace his own ban on

contributions to candidates for attorney general. *Green Party of Connecticut v. Garfield*, Docket #09-3760-cv(L), 09-3941-cv(CON).

Law firms doing business with the State of Connecticut include some of the largest firms in Connecticut and New York. Over the fourteen years of Mr. Blumenthal's ban on contributions, the ban has barred, and at times when temporarily suspended chilled, the potential contributions of thousands of people to candidates such as Dean who opposed Mr. Blumenthal for elected office.

Notably, the Attorney General's self-styled contractual ban on contributions to candidates for Attorney General coincides with the respondent Attorney General's four severely lop-sided electoral victories as an incumbent. In all, Mr. Blumenthal will, at the end of 2010, have held the office of Connecticut Attorney General for an unprecedented twenty years.

Today, candidate Dean is considering entering the 2010 Attorney General's race. She is hesitant to do so, however, because of the chilling effect the ban has had on contributions by attorneys and their spouses and staff over the years and the fact that the ban's language remains in effect in some state contracts with law firms. With the new uncertainty concerning the constitutionality of the state statute that Mr. Blumenthal claimed would supercede the language still in contracts, there is now additional uncertainty surrounding whether and how any new Attorney General in 2011 might handle any

contributions made in 2010 to a challenger in contravention of the ban.

On January 29, 2010, Mr. Blumenthal, now running as a candidate for U.S. Senate, was quoted by the Associated Press as stating recently "there is no apparent reason or benefit for the State to settle with Dean considering two federal courts saw no merit in her lawsuit" challenging Mr. Blumenthal's ban on contributions to Dean under the First Amendment to the Constitution.

REASONS TO GRANT THE PETITION

I. This Case Involves a Matter of National Importance

This case involves the vitally important question of how to protect the rights of candidates to raise and spend campaign funds free from improper government interference. Only by protecting equally the full bundle of rights essential to any effort by a candidate to mount an effective political campaign will candidates be able to succeed in challenging, as envisioned by our nation's founders, office-holders who are entrenched, corrupt, or disinterested. The flow of money in and out of campaigns is indistinguishable in terms of constitutional importance. This case provides the vehicle for the Court to clarify that candidates' rights to raise and spend campaign funds are both entitled to the highest level of constitutional protection.

This Court has rejected attempts to restrict a candidate's right to spend money to wage a strong campaign. The Court should now take up the challenge posed by the appellate court's holding and state with clarity and specificity that candidates have First Amendment rights to raise campaign funds and that these rights enjoy the protection of strict scrutiny. This case presents the Court with that opportunity. The facts alleged demonstrate the urgency of addressing clever, but particularly insidious, attempts to use the as-yet less-protected right to contribute to campaigns to affect improper restraints on a candidate's right to raise funds to conduct a campaign.

II. The Holding Below on the Existence of a Candidate's First Amendment Right to Raise Funds Is in Direct Conflict with this Court's Decisions

This Court should correct the appellate court's erroneous holding that a candidate's First Amendment right to raise campaign funds was not clearly established in 2002 and may not be established even now. The lower court's holding conflicts with *Buckley v. Valeo*, 424 U.S. 1 (1976) and the more than thirty years of campaign finance cases since then. *See, e.g.*, *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), *Randall v. Sorrell*, 548 U.S. 230 (2007). The lower court's holding, if uncorrected, threatens to unravel thirty years of already weak constitutional protections afforded candidates conducting campaigns.

Buckley, *Nixon*, and *Randall* all recognize a candidate's right to raise campaign funds as an essential part of conducting an effective campaign. By its strong and specific language, *Buckley* placed public officials on notice that "[campaign] contribution . . . limits operate in an *area* of the most fundamental First Amendment liberties," 424 U.S. at 14 (emphases added), that "substantial and direct *restrictions* on the *ability* of *candidates* . . . to engage in protected political expression, [are] restrictions that the First Amendment cannot tolerate," *id.* at 59 (emphases added), and that "the [First Amendment's] constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the *conduct of campaigns* for political office," *id.* at 15 (emphases added) *quoting Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), and not merely to limitations on contributions.

Buckley draws a line of First Amendment protection around the entire *area* of exchanges of contributions into and out of political campaigns. In *Buckley*, this Court states unequivocally and specifically that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented *candidates* . . . from *amassing the resources* necessary for effective advocacy." *Buckley*, *supra*, at 21. From *Buckley*, forward public officials have been on notice that the general First Amendment marketplace of giving and receiving ideas and information includes both the raising and spending of campaign funds.

Almost thirty years elapsed between *Buckley* and the 2002 Connecticut Attorney General race without this Court seeing the need to clarify what was obvious: candidates have a First Amendment right to raise money without improper government interference. The Court's recent statements on candidates' First Amendment rights in *Randall* confirm its interpretation that *Buckley* applies First Amendment heightened scrutiny to contribution limits that restrict the fundraising ability of candidates. *Randall*, 548 U.S. at 248.

Yet, in the present case, even after being overruled by this Court in *Randall*, the appellate court claims a lack of clarity as to whether a candidate has a First Amendment right to raise money. "We emphasize," states the appellate court, "that, although we do not consider the right to receive campaign contributions to have been well-established during the relevant time period, [*Randall*'s] analysis did not foreclose such recognition." App. 19. The appellate court's statements conflict with the very language it quotes from *Randall* and *Buckley*. In both decisions this Court states unequivocally that contribution limits that are too low can operate to *prevent candidates from mounting effective campaigns* against incumbents *thereby* reducing free speech. *See, e.g., id.* at 248-249 and 253.

Recently, on September 10, 2009, ninety-one former attorneys general filed a joint brief with this Court that demonstrates just how far off the mark and in need of correction the appellate court's holding

is. Asserting the First Amendment right to receive campaign funds on the brief's first page, the attorneys general find the legal proposition that a candidate has a First Amendment right to raise campaign funds through individual contributions so fundamental and obvious as to not require *any* support. The brief states in bare simplicity that the protection afforded under the First Amendment by this Court extends to "the giving *and receiving* of political contributions." Brief *Amici Curiae* of Former Attorneys General in Support of Petitioner at 1, *Siegelman v. U.S.*, 561 F.3d 1215 (11th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3090 (U.S. August 10, 2009) (No. 09-182) retrieved September 21, 2009, from http://www.donsiegelman.org/files/91_Former_Attorneys_General.pdf.

Given the unequivocal language of *Buckley* and this Court's decisions in the thirty years since, combined with the fact that ninety-one former attorneys general find a candidate's First Amendment right to receive contributions so settled that there is no need to cite legal support for this proposition, it is clear that under this Court's "apparent right" test in *Anderson v. Creighton*, 483 U.S 635, 640 (1987)[1] for

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[1] The panel was mistaken in creating a heightened constitutional bar for Dean. This Court's decisions do not establish a requirement that this Court or the applicable circuit must have "specifically held" that a particular constitutional right exists. The correct legal standard, established by this Court in *Anderson*, does not require specificity. 483 U.S. at 640. *Anderson* holds that while "our cases establish that the right the official is alleged to

(Continued on following page)

ascertaining whether a First Amendment right of candidates to raise funds was clearly established, such a right was established long before the 2002 campaign. For these reasons, the panel's holding that "it was far from obvious [in 2002] whether in fact there is such a right" is incorrect and departs so significantly from the long line of this Court's holdings as to demand correction.

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have violated must have been "'clearly established'. . . . [t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.*

The Second Circuit has recognized *Anderson* as the correct legal standard for the "clearly established" analysis in the context of a qualified immunity defense and has stated that the *Anderson* standard does not require specificity. *Husain v. Springer,* 494 F.3d 108, 132 (2d Cir. 2007). *Husain* relies on *Anderson* to hold that where unlawfulness is "apparent," given preexisting law, such that the "contours of the right" were sufficiently clear for a reasonable official to understand he was violating that right even though no court had previously held specifically that the precise conduct challenged was unlawful.

If the appellate court had analyzed Dean's asserted First Amendment right under the appropriate "contour of the right was apparent" test of *Anderson* and *Husain,* it would have found a candidate's First Amendment right to raise funds through contributions clearly established. The appellate court in this case did not need to embark on an *Anderson*'s type analysis, however, because the specific constitutional right at issue has been known to exist for more than thirty years.

III. The Court Should Decide Whether the Attorney General's Ban on Contributions Is Constitutional and Identify the Proper Test for Making Such a Determination

Whether an elected official's single-handed imposition of a unilateral, self-styled, sweeping ban on contributions to his opponents for public office could ever survive a strict scrutiny analysis is a question of national importance. As incumbents become ever more wily at evading this Court's constitutional limitations on their conduct, it is critical that this Court establish the level of scrutiny applicable to such apparent lawlessness such that candidates are able to recognize impermissible restrictions and vindicate their rights with relative ease.

Even if it is assumed, for discussion purposes, that Mr. Blumenthal had the authority to determine for the entire State of Connecticut what constitutes a "compelling state interest," there was no evidence in this case – or even a claim – of a compelling state interest that would justify the Attorney General's ban on contributions. Mr. Blumenthal's bare claim that the ban was necessary to protect "the integrity of the office" is insufficient under this Court's decisions and it is disingenuous where Mr. Blumenthal's own conduct demonstrates otherwise. Consider, for example, that he did not abide by his own ban and reported in his fundraising reports to the State that he received prohibited contributions; he did not take the steps necessary to even try to comply with his own ban, such as identifying the names of the

thousands of people covered by the ban for the purposes of assuring his own obligation to reject these contributions; the ban did not prevent him from awarding contracts to those who contributed to him, who were not in contract with the State at the time of their contribution, but who wished to be, in contravention of his stated purpose for the ban; and he never enforced the ban against the firms to which he awarded contracts, even though he acknowledged receiving prohibited contributions and returning the ones of which he was aware. Still, the ban had the real effect intended; it created a chilling effect on contributions to Mr. Blumenthal's opponents and virtually guaranteed his lopsided re-election victories as challengers encountered resistance to solicitation efforts, citing the ban. As this Court has held, Mr. Blumenthal would have to show much more than a general intent to prevent corruption or to prevent the appearance of corruption.

The second prong of a strict scrutiny analysis would reveal that Mr. Blumenthal's ban was not narrowly tailored: it allowed attorneys doing business with the State to contribute to his campaigns for other offices (such as to his current campaign for the U.S. Senate) while he was Attorney General and in a position to award State contracts; it allowed firms that desired contracts with the State, but which did not have them yet, to contribute to the Attorney General in an effort to persuade him to award contracts; it covered contracts between the state and law firms that did not even involve working with the

Attorney General's office and that were not awarded by Mr. Blumenthal's office; and it was interpreted by Mr. Blumenthal to cover people who had no business interest in the law firms or involvement with Mr. Blumenthal's office under the state contract, such as paralegals and associates.

In contrast with other cases addressing restrictions on constitutionally-protected political speech, the Attorney General did not claim in this case the existence of any facts showing corruption or other improprieties that might justify a ban on contributions to broad categories of people only remotely-related to the affected law firm's contracts with the State. In fact the only public scandal involving corruption allegations and the Attorney General's office was Mr. Blumenthal's own scandal in awarding a contingency fee contract that would pay out most of $900 million to the two small law firms owned by his former law partner and law partner's wife. The tobacco contingency fee contract award scandal was never connected to political contributions to Mr. Blumenthal or to other attorney general candidates, proving what should be obvious: that it is possible to influence office holders in ways that have nothing to do with contributions. Furthermore, Mr. Blumenthal's ban on contributions to his opponents predated the bribery scandals in Connecticut. If Mr. Blumenthal's ban was truly instituted to guard against corruption, its effectiveness was assumed based on sheer speculation and it represented an impermissibly sweeping

and heavy-handed tool with which to accomplish the stated goal.

The Court should take up this petition in part because under the Court's existing precedents it is not clear that there is any scenario in which an individual official's ban on contributions to candidate challengers could ever be constitutionally permissible. This is especially true where the ban is implemented outside of the procedural protections and public scrutiny of the legislative and rule-making processes by an elected official who is acting alone. But by avoiding deciding this issue and dismissing the case, and denying Dean any recovery, the appellate court's decision leaves the impression that it has sanctioned such extra-legal bans. In fact, as recently as days ago, Mr. Blumenthal was quoted in the papers as claiming "there is no apparent reason or benefit for the State to settle with Dean considering two federal courts saw no merit in her lawsuit." If Mr. Blumenthal is correct, this Court should say so, but if not, it is of national importance for this Court to correct the decision of the court below.

The appellate court's ruling should be overturned in part because it has the reverse effect of this Court's goals in deciding cases. Rather than clarifying the rules applicable to candidates' First Amendment rights, the appellate court muddies them considerably. Rather than removing improper burdens to First Amendment rights, the court's decision will likely embolden officials and encourage more bans by incumbents on contributions to challengers. For all of

these reasons, it is of urgent national importance that the Court take up the petition and give the constitutional permissibility of such bans the benefit of full airing and analysis by this Court.

The appellate court's flawed legal analysis and failure to decide the key constitutional issues before it have far-reaching, draconian, and speech-limiting implications for candidates nationwide. If allowed to stand, the lower court's decision places candidates and public officials, nationwide, in the dark on a critical constitutional issue; it creates uncertainty that operates as a practical bar to would-be challengers entering political races; and, it increases the prospect that candidates who are forced to challenge such bans will have to bear the twin financial burdens of reduced fund-raising ability combined with drawn-out and costly litigation, as this case aptly demonstrates.

IV. The Appellate Court's Dismissal on the Ground of Qualified Immunity Was Erroneous and in Direct Conflict with this Court's Decisions

The appellate court's dismissal of this case on the ground of qualified immunity was in direct contravention of the test for qualified immunity established by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) and should be overturned. *Harlow* holds that qualified immunity protects government officials "from liability for civil damages insofar as their

conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. In the present case, as stated above, this Court established clearly the First Amendment right of a candidate to fundraise, long before the 2002 campaign, under the "apparent right" test in *Anderson*. The Court should take up this petition to ensure that public officials who knowingly violate a candidate's constitutional right to raise campaign funds are not immunized from damages for the harm they cause to challengers who oppose them for office.

CONCLUSION

For the reasons stated, this Court should grant this petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: November 10, 2008 Decided: August 11, 2009)

Docket No. 07-1986-cv

MARTHA DEAN,

Plaintiff-Appellant,

ROBERT FARR,

Plaintiff,

– v. –

RICHARD BLUMENTHAL,

Defendant-Appellee.

Before: KATZMANN and HALL, *Circuit Judges*.*

Appeal from an April 9, 2007 judgment of the United States District Court for the District of Connecticut (Thompson, *J.*), dismissing a First

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* The Honorable Sonia Sotomayor, originally a member of the panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined the matter. *See* 28 U.S.C. § 46(b); Local Rule 0.14(2); *United States v. Desimone,* 140 F.3d 457 (2d Cir. 1998).

Amendment challenge to a prohibition on contributions by, *inter alia*, certain law-firm employees to candidates for Connecticut Attorney General. We hold that all requested relief, other than damages, is moot and that appellee is entitled to qualified immunity from damages because there was no clearly established right under the First Amendment to receive campaign contributions at the time of the challenged conduct. Accordingly, we AFFIRM the judgment of the district court.

KAREN LEE TORRE, Law Offices of Karen Lee Torre, New Haven, CT, *for Appellant.*

GREGORY T. D'AURIA, Associate Attorney General (Richard Blumenthal, Attorney General, Susan Quinn Cobb, Assistant Attorney General, Jane R. Rosenberg, Assistant Attorney General, *on the brief*), Office of the Attorney General for the State of Connecticut, Hartford, CT, *for Appellee.*

PER CURIAM:

Martha Dean appeals from an April 9, 2007 judgment of the United States District Court for the District of Connecticut (Thompson, *J.*), dismissing her complaint. Dean, a former and possibly future candidate for Attorney General in Connecticut, argues that a contractual prohibition on contributions to candidates for the Office of the Attorney General

from, *inter alia,* certain employees of private law firms that performed legal work for the State violated Dean's rights under the First Amendment. Because the challenged contractual language has not been enforced in over six years and could not reasonably be expected to be reimplemented, we hold that Dean's requested relief of a declaratory judgment, injunctive relief, and a cease-and-desist order are moot. We also hold that appellee Richard Blumenthal is entitled to qualified immunity from Dean's claim for damages because there was no clearly established right under the First Amendment to receive campaign contributions during the relevant period. Accordingly, we affirm the judgment of the district court.

BACKGROUND

Under Connecticut General Statute § 3-125, the Attorney General for the State of Connecticut ("Attorney General") "may procure such assistance as he [or she] may require" in carrying out his or her official responsibilities. Pursuant to this statute, the State of Connecticut, acting through its Attorney General, has contracted a portion of the State's legal business to the private bar.

From 1995 to October 2002, Attorney General Richard Blumenthal included and enforced the following provision in contracts with outside counsel:

> No partner, owner, director and/or employee, with managerial and/or discretionary authority, of the COUNSEL may directly or

> indirectly make financial donations to any candidate for the Office of the Attorney General of the State of Connecticut during the course of this agreement.

The Attorney General interpreted this language to apply to all lawyers in a contracting law firm as well as to spouses of covered lawyers. According to the Attorney General, this provision was included in order to avoid the appearance that the contracting law firm was being awarded a contract in exchange for future campaign contributions.

In 2002, this policy was challenged by appellant Martha Dean, who was the Republican Party's candidate in Connecticut for the Office of the Attorney General. Her opponent was appellee Blumenthal, who at that time had held the office for twelve years. Prior to election day, Dean filed a complaint in which she alleged that Blumenthal's policy on campaign donations deprived her of "needed financing for her campaign as a result of willing contributors withholding contributions for fear of suffering the loss of the State's business." (Compl. ¶ 19.) Pursuant to 42 U.S.C. § 1983, Dean asserted that Blumenthal's policy both violated her right under the First Amendment to receive campaign contributions and deprived her of her "right to receive funding for her campaign from otherwise willing supporters without due process of law" in violation of the Fourteenth Amendment. (Compl. ¶¶ 21-22, 26.) Dean also alleged violations of the Connecticut Constitution. She sought relief including damages, a judgment declaring the

contractual bar on campaign contributions to be null and void, a cease-and-desist order, and a preliminary injunction enjoining the promulgation of the policy.

Approximately one week prior to the election, Blumenthal temporarily suspended the contractual prohibition on campaign contributions pending a final decision by the district court. A letter was faxed to all firms with contracts with the Office of the Attorney General notifying them of the suspension. Blumenthal, however, continued to refuse to accept any campaign contributions from partners and associates (as well as their spouses) of any law firm holding an outside counsel contract with the Attorney General's office. After winning re-election, Blumenthal moved to dismiss Dean's complaint.

Approximately four years passed between Blumenthal's motion to dismiss and the district court's eventual ruling. Because the lawsuit had not been resolved by the next election cycle in 2006, Blumenthal continued his suspension of the campaign contribution prohibition.[1] Once again, a letter was faxed to all firms with open contracts with the

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[1] Although Dean did not run for Attorney General in 2006, she pursued her claims on the ground that she was considering a campaign in the following election cycle and, regardless of her political intentions, was entitled to damages as well as attorney's fees. Robert Farr, the Republican Party's nominee for the Office of Attorney General in 2006, was added as a party to Dean's complaint. Farr subsequently filed a notice of voluntary dismissal, which was approved by the district court. Thus, he is not a party to this appeal.

Office of the Attorney General notifying them of the policy's continued suspension. In addition, the Connecticut General Assembly passed campaign finance legislation in December 2005 that prohibited contributions from, *inter alia,* state contractors and prospective state contractors to certain committees affiliated with a candidate for the Office of Attorney General. *See* S. 2103, 2005 Gen. Assem., Spec. Sess. (Conn. 2005). As a result of this legislation, Blumenthal publicized to all firms with contracts with the Office of the Attorney General that the contractual bar on campaign contributions would be "wholly and permanently superseded" by the statutory ban as of December 31, 2006, the effective date of the campaign finance legislation.

In September 2006, the district court granted Blumenthal's motion to dismiss. The court held that Dean's claim under the Fourteenth Amendment failed because she could not demonstrate a liberty or property interest in the receipt of campaign contributions. It also dismissed Dean's state law claims as barred by the Eleventh Amendment.[2] During the following

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[2] Dean states in her brief that she does not appeal the dismissal of her state-law claims, but she then argues that Blumenthal violated the separation of powers "set forth in the Constitution of the State of Connecticut." In addition, Dean states in a section of her brief entitled "Summary of the Argument" that her federal right to due process was violated because "the restrictions established the defendant as the sole arbiter of when the restrictions had been violated with no meaningful review of his decisions." But she has failed to

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week, the district court dismissed Dean's remaining claim, which was based on the First Amendment. The district court concluded that Dean lacked standing because there existed no constitutional right to receive campaign contributions.

Discussion

As a preliminary matter, we address our subject-matter jurisdiction over this appeal, which we have an independent obligation to evaluate even in the absence of a challenge from any party. *Sharkey v. Quarantillo,* 541 F.3d 75, 88 (2d Cir. 2008). We lack jurisdiction if we conclude that a case is moot. *Fox v. Bd. of Trs. of the State Univ. of N.Y.,* 42 F.3d 135, 140 (2d Cir. 1994); *see also Steffel v. Thompson,* 415 U.S. 452, 459 n.10 (1974) ("The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."). "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 189 (2000) (internal quotation marks omitted); *see Church of Scientology of Cal. v. United States,* 506 U.S. 9, 12 (1992) ("It has

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develop either her state separation-of-powers or federal due process arguments and has therefore waived them. *See Norton v. Sam's Club,* 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal.").

long been settled that a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (internal quotation marks omitted)).

We conclude that much of Dean's appeal is moot and therefore beyond our jurisdiction to review. Dean's complaint principally seeks a declaratory judgment, injunctive relief, and a cease-and-desist order regarding an "office policy" that (it is undisputed) no longer exists. (Compl. at 12.) Dean attempts to avoid this complication by contending that Blumenthal could re-enact the policy at any moment, which might affect her if she runs in the next election and which, in any event, may amount to unconstitutional conduct that is capable of repetition yet evades review. *See Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 71 (2d Cir. 2001) ("A narrow exception to the principle that a moot claim is to be dismissed, available only in exceptional situations, is that the court may adjudicate a claim that, though technically moot, is capable of repetition, yet evading review." (citations and internal quotation marks omitted)).

It is clear, however, that the Attorney General will not re-enact the contractual bar on campaign contributions. The Attorney General has represented to the Court that he "has no intent to reintroduce the challenged provision into his contracts." Standing alone, this representation might not suffice to render moot Dean's requested relief. *See United States v.*

W.T. Grant Co., 345 U.S. 629, 633 (1953) (holding that, although defendant had "disclaimed any intention" to revive the challenged conduct, "[s]uch a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts"); *see also Friends of the Earth, Inc.*, 528 U.S. at 189 (describing the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again" (internal quotation marks and brackets omitted)). But the Attorney General's claim is bolstered by his voluntary practice of not enforcing the contractual prohibition over the past six years and of deleting the contractual prohibition over two years ago.

Moreover, although "[v]oluntary cessation of illegal conduct does not necessarily render the controversy moot," *N.Y. State Nat'l Org. for Women v. Terry*, 159 F.3d 86, 91-92 (2d Cir. 1998), the Attorney General has further represented that Connecticut's campaign finance legislation, Conn. Gen. Stat. § 9-612(g)(2)(A), "wholly and permanently superseded" the contractual bar, thus rendering it "superfluous." It is true, as Dean asserts, that the statutory and contractual language do not cover identical conduct. For example, the Office of the Attorney General acknowledged that the contractual provision applied to contracts in all amounts, while § 9-612(g)(2)(A) applies only to contracts in excess of $50,000. *See* Conn. Gen. Stat. § 9-612(g)(1)(C). Nonetheless, it is

undisputed that, in reliance upon his interpretation that the statutory and contractual language cover sufficiently similar situations, the Attorney General voluntarily eliminated the contractual bar upon the statute's effective date over two years ago. The Attorney General also has not reimplemented his practice despite a favorable ruling from the district court in April 2007 that Dean lacked standing to challenge the contractual prohibition. Consequently, there is no "reasonably concrete basis to anticipate that the expired rule will be reenacted in a form that will raise the same questions." 13C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3533.6 (3d ed. 2008).

In light of (1) the undisputed fact that the contractual bar is no longer in effect, (2) the Attorney General's consistent and voluntary conduct over an extended period of time in not enforcing the contractual ban, (3) his removal of the challenged contractual language based upon his belief that legislation has "wholly and permanently" rendered the challenged practice unnecessary, (4) his representations that he has no intention to re-implement the practice, and (5) his declining to reimplement the challenged practice despite a favorable ruling from the district court dismissing Dean's complaint, we conclude that Dean's requested relief for a declaratory judgment, injunctive relief, and a cease-and-desist order are moot. *See Catanzano v. Wing*, 277 F.3d 99, 107 (2d Cir. 2001) ("Since both Plaintiffs and Defendants agree that the State is no longer

implementing the fiscal assessment laws, and there is no reason to expect that fiscal assessments are now occurring or that the legislature will reenact the laws, no controversy now exists with respect to this claim and it is therefore moot.").

Dean's complaint, however, also seeks damages, and Blumenthal's withdrawal of the challenged policy does not render moot Dean's requested relief for past constitutional violations. *See Stokes v. Vill. of Wurtsboro*, 818 F.2d 4, 6 (2d Cir. 1987) ("'Claims for damages or other monetary relief automatically avoid mootness, so long as the claim remains viable.'" (quoting 13A Charles Alan Wright, Arthur R. Miller, & Edward Cooper, *Federal Practice and Procedure* § 3533.3 (2d ed. 1984))); *see also Beyah v. Coughlin*, 789 F.2d 986, 988-89 (2d Cir. 1986) (holding that an allegedly unconstitutional practice, which no longer affects plaintiff, "may well moot [plaintiff's] claims for declaratory and injunctive relief" but does not moot the request for damages). Even if Dean's actual damages are speculative, "[i]t is clear that nominal damages are available in actions alleging violations of constitutionally protected rights."[3] *Fox*, 42 F.3d at 141.

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[3] Although Dean's complaint seeks only "damages," this term can include nominal damages. *See, e.g., Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 651 (2d Cir. 1998) ("[W]e have not precluded the award of nominal damages in the past if the complaint explicitly sought compensatory damages."); *Beyah*, 789 F.2d at 989 (holding that plaintiff's potential

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Because Dean's claims are not moot insofar as she seeks damages, we now consider Dean's claim that the Attorney General's policy violated her purported First Amendment right to receive campaign contributions. Blumenthal disputed the existence of any such right, and the district court agreed. Although we affirm the district court's judgment, we do not adopt its reasoning.[4] *See In re Certain Underwriter,* 294 F.3d 297, 302 (2d Cir. 2002) ("[W]e

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entitlement to nominal damages prevented his claim from being moot, even where defendant contended that plaintiff would not be able to establish requested compensatory and punitive damages).

[4] The district court dismissed Dean's claim under the First Amendment for lack of standing because it concluded that there was no constitutional right to receive campaign contributions. To establish Article III standing, a plaintiff must allege that she has suffered an injury-in-fact that is traceable to the challenged action of the defendant, and that is likely to be redressed by the requested relief. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). The injury-in-fact must be an invasion of a judicially cognizable interest that is (a) concrete and particularized and (b) actual or imminent. *Id.* It is true that "[t]he question whether there is an injury quickly becomes blended with the question whether to recognize the asserted interest that has in fact been impaired." 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.4 (3d ed. 2008). The district court, however, erroneously conflated the requirement for an injury-in-fact with the constitutional validity of Dean's claim. Dean has asserted that, as a result of the challenged contractual ban, she suffered the loss of a substantial base of financing for her campaign and cites, as an example, a request for a contribution refund from a supporter. Dean has therefore alleged a concrete, particularized, and actual harm that is sufficient to establish Article III standing.

are . . . free to affirm an appealed decision on any ground which finds support in the record." (internal quotation marks omitted)). Instead, we conclude that, regardless of whether a right to receive campaign contributions exists, it was not clearly established at the time of Blumenthal's alleged misconduct, and Blumenthal is therefore entitled to qualified immunity.[5] *See Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).[6]

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[5] Dean never explained whether her complaint was brought against Blumenthal in his official or individual capacity. We therefore examined the "course of proceedings to determine the nature of the liability to be imposed," *Frank v. Relin*, 1 F.3d 1317, 1326 (2d Cir. 1993) (internal quotation marks omitted), and have construed Dean's claims to be brought against Blumenthal in his individual capacity, thus making him eligible to raise a qualified immunity defense. *See Ying Jing Gan v. City of New York*, 996 F.2d 522, 529 (2d Cir. 1993).

[6] We consider whether Blumenthal is entitled to qualified immunity even though this argument is put forward for the first time on appeal. Although "it is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal," *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994), this "rule is prudential, not jurisdictional, [and] we have discretion to consider waived arguments," *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004) (per curiam). "We have exercised this discretion . . . where the argument presents a question of law and there is no need for additional fact-finding." *Id.* "The matter of whether a right was clearly

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Before discussing whether the right at issue was clearly established, however, we first explain how we approach our analysis of qualified immunity in light of the Supreme Court's recent re-examination of its holding in *Saucier v. Katz,* 533 U.S. 194 (2001), which had mandated a two-step sequence for resolving government officials' claims of qualified immunity. In the first step under *Saucier,* courts had asked the following question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. If a violation of a constitutional right was discerned, then the second question required by *Saucier* was "whether the right was clearly established." *Id.*

In *Pearson v. Callahan,* the Supreme Court recognized that *Saucier*'s protocol "is often beneficial," such as where the analysis of the facts under clearly established law "make[s] it apparent that . . . the relevant facts do not make out a constitutional violation at all" and where the question presented does "not frequently arise in cases in which a qualified immunity defense is unavailable." 129 S.Ct. at 818. But the Court rejected *Saucier*'s obligatory,

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established at the pertinent time is a question of law." *Kerman v. City of New York,* 374 F.3d 93, 108 (2d Cir. 2004). In this case, we asked the Attorney General at oral argument to discuss qualified immunity in response to Dean's argument that the Eleventh Amendment did not bar her damages claim because the Attorney General had been sued in his personal capacity.

two-step rule for resolving all qualified immunity claims. *Id.* at 817. The Court noted a variety of situations in which a two-step rule was inappropriate, including where:

> (1) "[I]t is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right."
>
> (2) A "constitutional question is so fact-bound that the decision provides little guidance for future cases."
>
> (3) "[I]t appears that the question will soon be decided by a higher court."
>
> (4) The constitutional decision rests "on an uncertain interpretation of state law."
>
> (5) The "answer to whether there was a violation may depend on a kaleidoscope of facts not yet fully developed."
>
> (6) The "briefing of constitutional questions is woefully inadequate."
>
> (7) A decision "may make it hard for affected parties to obtain appellate review of constitutional decisions."
>
> (8) Where the "sequence in which judges reach their conclusions in their own internal thought processes" is different from the two-step sequence prescribed by *Saucier*, thereby creating a "risk that a court may not devote

> as much care as it would in other circumstances to the decision of the constitutional issue."

Id. at 818-20 (internal quotation marks and brackets omitted). Based on these concerns, the Court held that "courts should have the discretion to decide whether th[e Saucier] procedure is worthwhile in particular cases." *Id.* at 821.

We exercise our discretion here and will initially evaluate whether the constitutional right asserted by Dean was clearly established during the relevant period. Only if the right was clearly established will we then consider whether the facts that Dean has alleged make out a violation of a constitutional right. We invert the once-mandatory *Saucier* sequence because, as discussed below, it is clear that a constitutional right to receive campaign contributions was not clearly established, but it is "far from obvious whether in fact there is such a right." *Id.* at 818. We also do not believe that a challenge to a practice that has been defunct for over six years, where injunctive relief is moot and where damages are speculative, presents an appropriate opportunity to explore the complexities of a difficult constitutional question.

In turning to our analysis of whether the constitutional right at issue here was clearly established, we may consider:

> (1) whether the right in question was defined with "reasonable specificity";

> (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991).

In attempting to demonstrate a right under the First Amendment to enjoy, in her words, "a meaningful opportunity to raise funds sufficient to mount an effective campaign," Dean argues principally by analogy to other First Amendment rights. First, Dean contends that the receipt of campaign contributions is like the right to receive speech or information, which is protected by the First Amendment. *See, e.g., Kleindienst v. Mandel,* 408 U.S. 753, 762 (1972) ("It is now well established that the Constitution protects the right to receive information and ideas." (internal quotation marks omitted)); *Application of Dow Jones & Co.,* 842 F.2d 603, 607 (2d Cir. 1988) ("[T]he First Amendment unwaveringly protects the right to receive information and ideas."). Second, she asserts that the right to receive campaign contributions necessarily follows from the "reciprocal" rights to make campaign contributions and expenditures, which enjoy protection under the First Amendment. *See Buckley v. Valeo,* 424 U.S. 1, 23 (1976) ("[C]ontribution and expenditure limitations

both implicate fundamental First Amendment interests.").[7]

We do not believe that a reasonable person would have known of a firmly established First Amendment right to receive campaign contributions when the challenged policy was in effect. Indeed, Dean has failed to cite any decision available during the relevant time period in which either this Court or the Supreme Court specifically held that a candidate has a First Amendment right to receive campaign contributions. *See In re County of Erie,* 546 F.3d 222, 229 (2d Cir. 2008) ("The question of whether a right is 'clearly established' is determined by reference to the case law extant at the time of the violation."). Instead, she relies heavily upon *Randall v. Sorrell,* 548 U.S. 230 (2006), in which the Supreme Court struck down a Vermont statute's limitations on campaign contributions and expenditures. Because this case was decided several years after Dean's complaint was filed and after Blumenthal had discontinued the challenged practice, any rule articulated by *Randall*

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[7] The act of contribution, which relates to both expressive and associational rights, involves protected speech because "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Buckley,* 424 U.S. at 22; *see also Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.,* 533 U.S. 431, 440 (2001) ("Spending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association.").

could not have been clearly established during the relevant period.

We emphasize that, although we do not consider the right to receive campaign contributions to have been well-established during the relevant time period, we do not agree with the district court's conclusion that such a right is "inconsistent with the structure of the [Supreme Court's] opinion in *Randall*." To the contrary, although *Randall* did not recognize a First Amendment right to receive campaign contributions, its analysis did not foreclose such recognition. *See, e.g., id.* at 248 ("[W]e must determine whether [the Vermont statute's] contribution limits prevent candidates from amassing the resources necessary for effective campaign advocacy." (internal quotation marks and brackets omitted)); *id.* at 248-49 ("[C]ontribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability."). The district court in this case placed great weight upon the fact that the Supreme Court in *Randall* considered as one among several factors – but did not view as dispositive – that the contested statute's "contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns."[8] *Id.* at 253. The district

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[8] In concluding that the campaign contribution limits were too restrictive, the Supreme Court also considered: (1) the statute's "insistence that political parties abide by *exactly* the

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court reasoned that if there were a right to receive contributions, then the Supreme Court would have recognized a First Amendment violation in *Randall* after concluding that the contribution limits significantly restricted the funding for challengers' campaigns.

We take issue with the district court's reasoning in two respects. First, the record in *Randall* merely "suggest[ed]" but did "not conclusively prove" that Vermont's statute significantly restricted a contender's funding. *Id.* In light of the record's inconclusiveness, a consideration of additional factors may have been necessary. Second, even if the Supreme Court recognized a First Amendment right to receive campaign contributions, that right need not be absolute and other considerations might be relevant. *See Buckley,* 424 U.S. at 25 ("[I]t is clear that neither the right to associate nor the right to participate in political activities is absolute. . . . Even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of

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same low contribution limits that apply to other contributors," which it concluded "threatens harm to . . . the right to associate in a political party"; (2) the requirement that volunteer expenses be included in calculating contribution limits; (3) the fact that the statute's limits were not adjusted for inflation, but declined in real value each year; and (4) the fact that nowhere in the record was there any special justification for the statute's low and restrictive contribution limits. *Randall,* 548 U.S. at 256-62.

associational freedoms." (citations, internal quotation marks, and parentheses omitted)).

In sum, Blumenthal is entitled to qualified immunity from Dean's claims for damages because a right to receive campaign contributions was not clearly established when the Attorney General's challenged practice was in effect.[9]

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the complaint is AFFIRMED.

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[9] Dean also seeks attorney's fees, presumably pursuant to 42 U.S.C. § 1988. It is true that "mootness is not determinative as to the propriety of an award of attorney's fees," which, instead, turns on whether plaintiff is a "prevailing party." *LaRouche v. Kezer,* 20 F.3d 68, 75 (2d Cir. 1994) (internal quotation marks omitted). But, given that we are affirming the district court's dismissal of Dean's complaint and that there has been no "material alteration of the legal relationship of the parties," Dean is clearly not a prevailing party and therefore is not entitled to attorney's fees. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.,* 532 U.S. 598, 604-05 (2001) (rejecting argument that party may be considered "prevailing" where defendant's change in conduct is voluntary (internal quotation marks omitted)).

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of August, two thousand and nine.

PRESENT: Robert A. Katzmann,
Peter W. Hall,
Circuit Judges.[1]

Martha Dean,

Plaintiff-Appellant,

Robert Farr,

Plaintiff,

v.

Richard Blumenthal,

Defendant-Appellee.

JUDGMENT
Docket Number:
07-1986-cv

(Filed Aug. 11, 2009)

The appeal in the above-captioned case from a judgment of United States District Court for the

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[1] The Honorable Sonia Sotomayor, originally a member of the panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined the matter. See 28 U.S.C. § 46(d); 2d Cir. R. § 0.14(2); *United States v. DeSimone*, 140 F.3d 457 (2d Cir. 1998).

District of Connecticut having been argued on the district court record and the parties' briefs. On consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the judgment of the District Court is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk

By: /s/ Judy Pisnanont
Judy Pisnanont,
Motions Staff Attorney

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of November, two thousand nine,

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Martha Dean,

Plaintiff-Appellant,

Robert Farr,

Plaintiff,

07-1986-cv

(Filed Nov. 3, 2009)

v.

Richard Blumenthal,

Defendant-Appellee.

Martha Dean having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez
Frank Perez, Deputy Clerk

C.G.S.A. § 9-612

Connecticut General Statutes Annotated Currentness

Title 9. Elections

Chapter 155(Refs & Annos)

§ 9-612. Other contributions by individuals. Principals of investment services firms, state contractors, principals of state contractors, prospective state contractors or principals of prospective state contractors. Lists. Subcontracts study. State officials or employees. Legislative caucus staff members

(a) No individual shall make a contribution or contributions in any one calendar year in excess of five thousand dollars to the state central committee of any party, or for the benefit of such committee pursuant to its authorization or request; or one thousand dollars to a town committee of any political party, or for the benefit of such committee pursuant to its authorization or request; or one thousand dollars to a legislative caucus committee or legislative leadership committee, or seven hundred fifty dollars to any other political committee other than (1) a political committee formed solely to aid or promote the success or defeat of a referendum question, (2) an exploratory committee, (3) a political committee established by an organization, or for the benefit of such committee pursuant to its authorization or request, or (4) a political committee formed by a slate

of candidates in a primary for the office of justice of the peace of the same town.

(b) No individual shall make a contribution to a political committee established by an organization which receives its funds from the organization's treasury. With respect to a political committee established by an organization which has complied with the provisions of subsection (b) or (c) of section 9-614, and has elected to receive contributions, no individual other than a member of the organization may make contributions to the committee, in which case the individual may contribute not more than seven hundred fifty dollars in any one calendar year to such committee or for the benefit of such committee pursuant to its authorization or request.

(c) In no event may any individual make contributions to a candidate committee and a political committee formed solely to support one candidate other than an exploratory committee or for the benefit of a candidate committee and a political committee formed solely to support one candidate pursuant to the authorization or request of any such committee, in an amount which in the aggregate is in excess of the maximum amount which may be contributed to the candidate.

(d) Any individual may make unlimited contributions or expenditures to aid or promote the success or defeat of any referendum question, provided any individual who makes an expenditure or expenditures in excess of one thousand dollars to promote the

success or defeat of any referendum question shall file statements according to the same schedule and in the same manner as is required of a campaign treasurer of a political committee under section 9-608.

(e) (1) Any individual acting alone may, independent of any candidate, agent of the candidate, or committee, make unlimited expenditures to promote the success or defeat of any candidate's campaign for election, or nomination at a primary, to any office or position. Except as provided in subdivision (2) of this subsection, any individual who makes an independent expenditure or expenditures in excess of one thousand dollars to promote the success or defeat of any candidate's campaign for election, or nomination at a primary, to any such office or position shall file statements according to the same schedule and in the same manner as is required of a campaign treasurer of a candidate committee under section 9-608.

(2) Any person who makes or obligates to make an independent expenditure or expenditures, as defined in section 9-601, intended to promote the success or defeat of a candidate for the office of Governor, Lieutenant Governor, Secretary of the State, State Treasurer, State Comptroller, Attorney General, state senator or state representative, which exceeds one thousand dollars, in the aggregate, during a primary campaign or a general election campaign, as defined in section 9-700, on or after January 1, 2008, shall file a report of such independent expenditure to the State Elections Enforcement Commission. The report shall

be in the same form as statements filed under section 9-608. If the person makes or obligates to make such independent expenditure or expenditures more than twenty days before the day of a primary or election, the person shall file such report not later than forty-eight hours after such payment or obligation. If the person makes or obligates to make such independent expenditure or expenditures twenty days or less before the day of a primary or election, the person shall file such report not later than twenty-four hours after such payment or obligation. The report shall be filed under penalty of false statement.

(3) The independent expenditure report in subdivision (2) of this subsection shall include a statement (A) identifying the candidate for whom the independent expenditure or expenditures is intended to promote the success or defeat, and (B) affirming that the expenditure is not a coordinated expenditure.

(4) Any person may file a complaint with the commission upon the belief that (A) any such independent expenditure report or statement is false, or (B) any person who is required to file an independent expenditure report under subdivision (2) of this subsection has failed to do so. The commission shall make a prompt determination on such a complaint.

(5) (A) If a person fails to file a report required under subdivision (2) of this subsection for an independent expenditure or expenditures made or

obligated to be made more than twenty days before the day of a primary or election, the person shall be subject to a civil penalty, imposed by the State Elections Enforcement Commission, of not more than five thousand dollars. If a person fails to file a report required under subdivision (2) of this subsection for an independent expenditure or expenditures made or obligated to be made twenty days or less before the day of a primary or election, the person shall be subject to a civil penalty, imposed by the State Elections Enforcement Commission, of not more than ten thousand dollars. (B) If any such failure is knowing and wilful, the person responsible for the failure shall also be fined not more than five thousand dollars or imprisoned not more than five years, or both.

(f) (1) As used in this subsection and subsection (f) of section 9-608, (A) "investment services" means investment legal services, investment banking services, investment advisory services, underwriting services, financial advisory services or brokerage firm services, and (B) "principal of an investment services firm" means (i) an individual who is a director of or has an ownership interest in an investment services firm to which the State Treasurer pays compensation, expenses or fees or issues a contract, except for an individual who owns less than five per cent of the shares of an investment services firm, (ii) an individual who is employed by such an investment services firm as president, treasurer, or executive vice president, (iii) an employee of such an investment

services firm who has managerial or discretionary responsibilities with respect to any investment services provided to the State Treasurer, (iv) the spouse or a dependent child who is eighteen years of age or older of an individual described in this subparagraph, or (v) a political committee established or controlled by an individual described in this subparagraph.

(2) No principal of an investment services firm shall make a contribution to, or solicit contributions on behalf of, an exploratory committee or candidate committee established by a candidate for nomination or election to the office of State Treasurer during the term of office of the State Treasurer who pays compensation, expenses or fees or issues a contract to such firm. The provisions of this subdivision shall apply only to contributions and the solicitation of contributions that are not prohibited under subdivision (2) of subsection (g) of this section.

(3) Neither the State Treasurer, the Deputy State Treasurer, any unclassified employee of the office of the State Treasurer acting on behalf of the State Treasurer or Deputy State Treasurer, any candidate for the office of State Treasurer, any member of the Investment Advisory Council established under section 3-13b nor any agent of any such candidate may knowingly, wilfully or intentionally solicit contributions on behalf of an exploratory committee or candidate committee established by a candidate for nomination or election to any public office, a political committee or a party committee, from a principal of

an investment services firm. The provisions of this subdivision shall apply only to contributions and the solicitation of contributions that are not prohibited under subdivision (3) of subsection (g) of this section.

(4) No member of the Investment Advisory Council appointed under section 3-13b shall make a contribution to, or solicit contributions on behalf of, an exploratory committee or candidate committee established by a candidate for nomination or election to the office of State Treasurer.

(5) The provisions of this subsection shall not restrict an individual from establishing an exploratory or candidate committee or from soliciting for and making contributions to a town committee or political committee that the candidate has designated in accordance with subsection (b) of section 9-604, for the financing of the individual's own campaign or from soliciting contributions for such committees from persons not prohibited from making contributions under this subsection.

(g) (1) As used in this subsection and subsections (h) and (i) of this section:

(A) "Quasi-public agency" has the same meaning as provided in section 1-120.

(B) "State agency" means any office, department, board, council, commission, institution or other agency in the executive or legislative branch of state government.

(C) "State contract" means an agreement or contract with the state or any state agency or any quasi-public agency, let through a procurement process or otherwise, having a value of fifty thousand dollars or more, or a combination or series of such agreements or contracts having a value of one hundred thousand dollars or more in a calendar year, for (i) the rendition of services, (ii) the furnishing of any goods, material, supplies, equipment or any items of any kind, (iii) the construction, alteration or repair of any public building or public work, (iv) the acquisition, sale or lease of any land or building, (v) a licensing arrangement, or (vi) a grant, loan or loan guarantee. "State contract" does not include any agreement or contract with the state, any state agency or any quasi-public agency that is exclusively federally funded, an education loan, a loan to an individual for other than commercial purposes or any agreement or contract between the state or any state agency and the United States Department of the Navy or the United States Department of Defense.

(D) "State contractor" means a person, business entity or nonprofit organization that enters into a state contract. Such person, business entity or nonprofit organization shall be deemed to be a state contractor until December thirty-first of the year in which such contract terminates. "State contractor" does not include a municipality or any other political subdivision of the state, including any entities or associations duly created by the municipality or political subdivision exclusively amongst themselves

to further any purpose authorized by statute or charter, or an employee in the executive or legislative branch of state government or a quasi-public agency, whether in the classified or unclassified service and full or part-time, and only in such person's capacity as a state or quasi-public agency employee.

(E) "Prospective state contractor" means a person, business entity or nonprofit organization that (i) submits a response to a state contract solicitation by the state, a state agency or a quasi-public agency, or a proposal in response to a request for proposals by the state, a state agency or a quasi-public agency, until the contract has been entered into, or (ii) holds a valid prequalification certificate issued by the Commissioner of Administrative Services under section 4a-100. "Prospective state contractor" does not include a municipality or any other political subdivision of the state, including any entities or associations duly created by the municipality or political subdivision exclusively amongst themselves to further any purpose authorized by statute or charter, or an employee in the executive or legislative branch of state government or a quasi-public agency, whether in the classified or unclassified service and full or part-time, and only in such person's capacity as a state or quasi-public agency employee.

(F) "Principal of a state contractor or prospective state contractor" means (i) any individual who is a member of the board of directors of, or has an ownership interest of five per cent or more in, a state contractor or prospective state contractor, which is a

business entity, except for an individual who is a member of the board of directors of a nonprofit organization, (ii) an individual who is employed by a state contractor or prospective state contractor, which is a business entity, as president, treasurer or executive vice president, (iii) an individual who is the chief executive officer of a state contractor or prospective state contractor, which is not a business entity, or if a state contractor or prospective state contractor has no such officer, then the officer who duly possesses comparable powers and duties, (iv) an officer or an employee of any state contractor or prospective state contractor who has managerial or discretionary responsibilities with respect to a state contract, (v) the spouse or a dependent child who is eighteen years of age or older of an individual described in this subparagraph, or (vi) a political committee established or controlled by an individual described in this subparagraph or the business entity or nonprofit organization that is the state contractor or prospective state contractor.

(G) "Dependent child" means a child residing in an individual's household who may legally be claimed as a dependent on the federal income tax return of such individual.

(H) "Managerial or discretionary responsibilities with respect to a state contract" means having direct, extensive and substantive responsibilities with respect to the negotiation of the state contract and not peripheral, clerical or ministerial responsibilities.

(I) "Rendition of services" means the provision of any service to a state agency or quasi-public agency in exchange for a fee, remuneration or compensation of any kind from the state or through an arrangement with the state.

(J) "State contract solicitation" means a request by a state agency or quasi-public agency, in whatever form issued, including, but not limited to, an invitation to bid, request for proposals, request for information or request for quotes, inviting bids, quotes or other types of submittals, through a competitive procurement process or another process authorized by law waiving competitive procurement.

(2) On and after December 31, 2006:

(A) No state contractor, prospective state contractor, principal of a state contractor or principal of a prospective state contractor, with regard to a state contract or a state contract solicitation with or from a state agency in the executive branch or a quasi-public agency or a holder, or principal of a holder of a valid prequalification certificate, shall make a contribution to, or solicit contributions on behalf of (i) an exploratory committee or candidate committee established by a candidate for nomination or election to the office of Governor, Lieutenant Governor, Attorney General, State Comptroller, Secretary of the State or State Treasurer, (ii) a political committee authorized to make contributions or expenditures to or for the benefit of such candidates, or (iii) a party committee;

(B) No state contractor, prospective state contractor, principal of a state contractor or principal of a prospective state contractor, with regard to a state contract or a state contract solicitation with or from the General Assembly or a holder, or principal of a holder, of a valid prequalification certificate, shall make a contribution to, or solicit contributions on behalf of (i) an exploratory committee or candidate committee established by a candidate for nomination or election to the office of state senator or state representative, (ii) a political committee authorized to make contributions or expenditures to or for the benefit of such candidates, or (iii) a party committee;

(C) If a state contractor or principal of a state contractor makes or solicits a contribution prohibited under subparagraph (A) or (B) of this subdivision, as determined by the State Elections Enforcement Commission, the contracting state agency or quasi-public agency may, in the case of a state contract executed on or after February 8, 2007, void the existing contract with said contractor, and no state agency or quasi-public agency shall award the state contractor a state contract or an extension or an amendment to a state contract for one year after the election for which such contribution is made or solicited unless the commission determines that mitigating circumstances exist concerning such violation. No violation of the prohibitions contained in subparagraph (A) or (B) of this subdivision shall be deemed to have occurred if, and only if, the improper contribution is returned to the principal by the later

of thirty days after receipt of such contribution by the recipient committee treasurer or the filing date that corresponds with the reporting period in which such contribution was made; and

(D) If a prospective state contractor or principal of a prospective state contractor makes or solicits a contribution prohibited under subparagraph (A) or (B) of this subdivision, as determined by the State Elections Enforcement Commission, no state agency or quasi-public agency shall award the prospective state contractor the contract described in the state contract solicitation or any other state contract for one year after the election for which such contribution is made or solicited unless the commission determines that mitigating circumstances exist concerning such violation. The Commissioner of Administrative Services shall notify applicants of the provisions of this subparagraph and subparagraphs (A) and (B) of this subdivision during the prequalification application process.

(E) The State Elections Enforcement Commission shall make available to each state agency and quasi-public agency a written notice advising state contractors and prospective state contractors of the contribution and solicitation prohibitions contained in subparagraphs (A) and (B) of this subdivision. Such notice shall: (i) Direct each state contractor and prospective state contractor to inform each individual described in subparagraph (F) of subdivision (1) of this subsection, with regard to said state contractor or prospective state contractor, about the provisions

of subparagraph (A) or (B) of this subdivision, whichever is applicable, and this subparagraph; (ii) inform each state contractor and prospective state contractor of the civil and criminal penalties that could be imposed for violations of such prohibitions if any such contribution is made or solicited; (iii) inform each state contractor and prospective state contractor that, in the case of a state contractor, if any such contribution is made or solicited, the contract may be voided; (iv) inform each state contractor and prospective state contractor that, in the case of a prospective state contractor, if any such contribution is made or solicited, the contract described in the state contract solicitation shall not be awarded, unless the commission determines that mitigating circumstances exist concerning such violation; and (v) inform each state contractor and prospective state contractor that the state will not award any other state contract to anyone found in violation of such prohibitions for a period of one year after the election for which such contribution is made or solicited, unless the commission determines that mitigating circumstances exist concerning such violation. Each state agency and quasi-public agency shall distribute such notice to the chief executive officer of its contractors and prospective state contractors, or an authorized signatory to a state contract, and shall obtain a written acknowledgement of the receipt of such notice.

(3) (A) On and after December 31, 2006, neither the Governor, Lieutenant Governor, Attorney General,

State Comptroller, Secretary of the State or State Treasurer, any candidate for any such office nor any agent of any such official or candidate shall knowingly, wilfully or intentionally solicit contributions on behalf of an exploratory committee or candidate committee established by a candidate for nomination or election to any public office, a political committee or a party committee, from a person who he or she knows is prohibited from making contributions, including a principal of a state contractor or prospective state contractor with regard to a state contract solicitation with or from a state agency in the executive branch or a quasi-public agency or a holder of a valid prequalification certificate.

(B) On and after December 31, 2006, neither a member of the General Assembly, any candidate for any such office nor any agent of any such official or candidate shall knowingly, wilfully or intentionally solicit contributions on behalf of an exploratory committee or candidate committee established by a candidate for nomination or election to any public office, a political committee or a party committee, from a person who he or she knows is prohibited from making contributions, including a principal of a state contractor or prospective state contractor with regard to a state contract solicitation with or from the General Assembly or a holder of a valid prequalification certificate.

(4) The provisions of this subsection shall not apply to the campaign of a principal of a state contractor or prospective state contractor or to a principal of a state

contractor or prospective state contractor who is an elected public official.

(5) Each state contractor and prospective state contractor shall make reasonable efforts to comply with the provisions of this subsection. If the State Elections Enforcement Commission determines that a state contractor or prospective state contractor has failed to make reasonable efforts to comply with this subsection, the commission may impose civil penalties against such state contractor or prospective state contractor in accordance with subsection (a) of section 9-7b.

(h) (1) Not later than thirty days after February 8, 2007, each state agency and quasi-public agency shall prepare and forward to the State Elections Enforcement Commission, on a form prescribed by said commission, a list of the names of the state contractors and prospective state contractors with which such agency is a party to a contract, and any state contract solicitations or prequalification certificates issued by the agency. Not less than once per month, each state agency and quasi-public agency shall forward to said commission, on a form prescribed by the commission, any changes additions or deletions to said lists, not later than the fifteenth day of the month.

(2) Not later than sixty days after February 8, 2007, the State Elections Enforcement Commission shall (A) compile a master list of state contractors and prospective state contractors for all state agencies

and quasi-public agencies, based on the information received under subdivision (1) of this subsection, (B) publish the master list on the commission's Internet web site, and (C) provide copies of the master list to campaign treasurers upon request. The commission shall update the master list every month.

(i) The State Contracting Standards Board shall study subcontracts for state contracts and, not later than February 1, 2010, submit proposed legislation for extending the provisions of this subsection to such subcontracts to the joint standing committee of the General Assembly having cognizance of matters relating to elections.

(j) (1) As used in this subsection:

(A) "Quasi-public agency" has the same meaning as provided in section 1-120.

(B) "Unclassified service" has the same meaning as provided in section 5-196.

(2) On and after December 31, 2006:

(A) No executive head of a state agency in the executive branch, executive head of a quasi-public agency, deputy of any such executive head, other full-time official or employee of any such state agency or quasi-public agency who is appointed by the Governor, other full-time official or employee of any such state agency or quasi-public agency who is in the unclassified service, or member of the immediate family of any such person, shall make a contribution or contributions (i) to, or for the benefit of, any

candidate's campaign for nomination at a primary or election to the office of Governor or Lieutenant Governor, in excess of one hundred dollars for each such campaign, or (ii) to a political committee established by any such candidate, in excess of one hundred dollars in any calendar year;

(B) No official or employee of the office of the Attorney General, State Comptroller, Secretary of the State or State Treasurer who is in the unclassified service, or member of the immediate family of any such person, shall make a contribution or contributions (i) to, or for the benefit of, any candidate's campaign for nomination at a primary or election to the office in which such official or employee serves, in excess of one hundred dollars for each such campaign, or (ii) to a political committee established by any such candidate, in excess of one hundred dollars in any calendar year; and

(C) No member of a caucus staff for a major party in the Senate or House of Representatives, or member of the immediate family of such person, shall make a contribution or contributions (i) to, or for the benefit of, any candidate's campaign for nomination at a primary or election to the office of state senator or state representative, in excess of one hundred dollars for each such campaign, (ii) to a political committee established by any such candidate, in excess of one hundred dollars in any calendar year, or (iii) to a legislative caucus committee or a

legislative leadership committee, in excess of one hundred dollars in any calendar year.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARTHA DEAN Plaintiff v. RICHARD BLUMENTHAL Defendant	)	Civil Action No. _____ October 25, 2002

AFFIDAVIT OF MARTHA A. DEAN

I, Martha A. Dean, being duly sworn, depose and say the following:

1. I am over the age of eighteen years and understand the obligation of an oath.

2. I am a member in good standing of the Connecticut bar, the U.S. District Court (Conn.), the U.S. Court of Appeals (2nd Cir.), and the U.S. Supreme Court.

3. I am the Republican nominee for Attorney General of the State of Connecticut for the November 5, 2002 state-wide election.

4. For the past eight months I have been working hard to raise money for my campaign through individual contributions. It is necessary to raise money to pay for ads in print, on the radio and on television so that I can get my message to Connecticut voters.

5. I have solicited campaign contributions from a large number of lawyers.

6. Most of the lawyers who work for large law firms who I have solicited have told me that they cannot contribute to my campaign because their firm has one or more contracts with Richard Blumenthal, Connecticut's current Attorney General.

7. I have also solicited campaign contributions from individuals whose spouses are employed by law firms that have contracts with the State of Connecticut.

8. Several lawyers employed by firms who have contracts with the State, and the spouses of such lawyers have contributed to my campaign without my knowledge or their knowledge that the contributions might not be permissible.

9. I learned from a lawyer at a firm that does business with the State that the reason why lawyers in his firm do not contribute to my campaign is there is a provision that Mr. Blumenthal inserted into the firm's contract with the State that prohibits contributions to any candidate for Attorney General. Lawyers and spouses have told me that they are afraid to contribute, or question the propriety of this policy for fear of loss of their employment, or their spouse's employment.

10. I learned from another lawyer in a different firm that does business with the State that Mr. Blumenthal inserts similar language prohibiting

contributions to candidates for Attorney General in *all* contracts between the State and private law firms – even in instances where the law firm is not hired by the attorney general's office but is chosen or requested by a State Commissioner or other agency officer.

11. Recently, in response to a request for documents from the Attorney General's office, I received copies of the relevant contract language.

12. I also received a copy of a letter sent by the Attorney General's Office in August 2002 to the Connecticut law firm of Updike Kelly & Spellacy, advising that firm that the Attorney General's policy banning contributions extends beyond partners of law firms and includes associates and the spouses of all lawyers. A true copy is attached hereto as Exhibit 1.

13. In reviewing information contained in documents requested and received by me from the State's Office of Policy and Management, it is evident that the State spends millions of dollars in contracting out legal work to the private bar. I have also reviewed the lists of firms that have received fees from the state, many in the range of hundreds of thousands of dollars and a few in excess of one million dollars. I have also reviewed the campaign donor lists relevant to Mr. Blumenthal's current campaign and his campaigns in 1990 and 1998. On those lists are the names of attorneys who I know to be employed at some of the firms identified by the

State as having been awarded contracts for legal services with the State.

14. Recently, a contributor requested a refund of a financial contribution to my campaign after she realized that the contribution would breach the provision inserted by Mr. Blumenthal into the firm's contract with the State. A true copy is attached hereto as Exhibit 2.

/s/ Martha Dean
MARTHA DEAN

STATE OF CONNECTICUT)
) ss. New Haven
COUNTY OF NEW HAVEN)

Before me, the undersigned, Martha A. Dean personally appeared, this 25th day of October, 2002, who acknowledged the execution of the same to be her free act and deed and who swore to the truth of the matters set forth therein.

/s/ Robyn Healy
Notary Public\Commissioner
of the Superior Court
My Commission expires: 9/30/07

[SEAL]
Office of The Attorney General
State of Connecticut

RICHARD BLUMENTHAL
ATTORNEY GENERAL

53 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

(860) 508-5313

August 29, 2002

Attorney James H. Lloyd, III
Updike, Kelly & Spellacy
One State Street
P.O. Box 231277
Hartford, CT 06123-1277

Dear Attorney Lloyd:

This letter is in response to the request from your office seeking an interpretation of the contractual ban on financial donations to candidates for the Office of the Attorney General contained in a professional employment agreement. As you explained in your letter, the relevant section of the agreement between the State of Connecticut, Acting by its Attorney General and Its Treasurer, and Updike, Kelly & Spellacy states:

> No partner, owner, director and/or employee, with managerial and/or discretionary authority, of the COUNSEL may directly or indirectly make financial donations to any candidate for the Office of the Attorney General of the State of Connecticut during the course of this agreement.

You have requested "clarification" as to whether spouses of the prohibited class members are included in the ban on donations. You also ask if all associate attorneys in your office are subject to the prohibition. I conclude that spouses of restricted individuals are included in the ban. I also conclude that associate attorneys are contractually prohibited from contributing to the political campaign of a candidate for the Attorney General's Office.

To the extent applicable, I construe the language of the contractual agreement in light of similar legislative prohibitions on political contributions to candidates for certain state offices and interpretation of these statutes by the State Election Enforcement Commission (hereinafter "Commission"), which is charged with their enforcement. It is well established that great deference should be afforded to the construction given a statute by the agency charged with its enforcement. *Cadlerock Properties Joint Venture, L.P. v. Commissioner of Environmental Protection*, 253 Conn. 661, 668-69 (2000).

In September 2000, the Commission was asked to render an opinion as to whether the statutory ban contained in Conn. Gen. Stat. § 9-333n(f)(5) applied to spouses of prohibited donors: Prior to July 1, 2002, the campaign financing statutes prohibited an owner or employee of a firm providing investment services to the State Treasurer from making political contributions to candidates for any public office. Conn. Gen. Stat. 9-333n(f)(5). In interpreting this section, the Commission concluded that spouses were not

subject to the same statutory ban as the prohibited donor. *Opinion of Counsel 2000-6.* October 27, 2000, p.3.

As you are aware, however, Public Act 02-130 eliminated the prohibition on contributions to elected officials other than the State Treasurer and more clearly defined the scope of the prohibition concerning donations to candidates for State Treasurer. As part of the overhaul of this statute, the legislature expanded the ban on contributions to candidates for State Treasurer to include the spouse of a prohibited donor. In his comments in support of the modification, Jeffrey Garfield, Executive Director of the State Elections Enforcement Commission, explained that the purpose of the modification was to broaden the existing ban and to prevent individuals from accomplishing indirectly, such as through donation through a third party, what the restricted individual could not accomplish directly. Public Hearings, Government Administration and Election, Pt. 1, 2002 Sess., p. 86. The remarks of Executive Director Garfield indicate that Public Act 02-130 was enacted to counter the Commission's position that the prior statute permitted donations by the spouse of a prohibited donor.

This recent amendment evinces a strong public policy to prohibit direct or indirect financial donations to any candidate for the Office of the Treasurer. Because the contractual provision at issue serves public policy goals similar to those inherent in Public Act 02-130, it is appropriate to construe the contract to include a similar prohibition.

Further support for my conclusion comes from the Ethics Commission's interpretation of the term "indirectly" in interpreting the State Ethics Code. Conn. Gen. Stat. §1-84(m), in pertinent part, states: "No . . . state employee shall knowingly accept, *directly or indirectly*, any gift . . . from any person the . . . employee knows or has reason to know . . . (2) is engaged in activities which are directly regulated by [the employee's] department or agency." (Emphasis added). In strictly enforcing the restriction, the Ethics Commission concluded that even unsolicited funds received by a state trooper for his legal defense, maintained in an account without disclosing the identity of the donor, violated the ban of acceptance of any gift directly or indirectly. Advisory Opinion No. 2002-5 *Application of the Code to Contributions to a State Employee's Legal Defense Fund*, I agree with the Ethics Commission that the term "indirectly" mandates that the ban must be read strictly to avoid the appearance of wrongdoing. For this reason, I conclude that the ban in the contract includes donations by a spouse.

You also ask if the ban is limited to officers and directors of the firm or if it includes associates in the firm as well. I conclude that the prohibition covers associates in the firm. As you explained in your letter, the ban applies to an employee with "managerial or discretionary authority." The term "discretionary" is not defined in the contract. It is axiomatic that where the parties do not define a term, we look to the plain meaning of the words. *Billings v. Billings*, 54 Conn.

App. 142, 146 (1999). The generally accepted definition of a discretionary act is one involving an exercise of "individual judgment." *Merriam-Webster New International Dictionary* (3d Ed. 1993); *Black's Law Dictionary* (7th Ed. 1999).

I construe the language of the contract in light of this definition and the commonly understood professional functions of a lawyer. In the course of rendering competent representation, an attorney is called upon to exercise his or her independent judgment on a daily basis. "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others." Preamble to the Connecticut Rules of Professional Conduct. Indeed, our rules of professional conduct require that each attorney "exercise independent professional judgment and render candid advice." Rule 2.1.

I therefore conclude that the plain language of the contract is directed to all employees with this "discretionary authority," which necessarily includes

all attorneys in the firm. I note however, that the ban is not so expansive that it covers every employee in the firm. For example, support staff who perform normal administrative activities such as typing, filing, and answering the phones are not subject to the contractual ban. Employees performing these types of activities are not exercising discretionary authority and are therefore not contractually prohibited from contributing to a candidate for the Office of the Attorney General as long as they are not acting at the direction of their employer.

In summary, I conclude that a spouse of a restricted donor is subject to the contractual prohibition. I further conclude that all associate attorneys in your office are covered by the contractual prohibition.

I trust this answers your inquiry.

Very truly yours,

/s/ Joseph Rubin
JOSEPH RUBIN
Associate Attorney General

JR/mdr/lmr

cc: Eliot Prescott, AAG
Maureen Regula, AAG

CUMMINGS & LOCKWOOD LLC

Jane Kimball Warren
860.275.6781 Direct
jwarren@cHaw.com

CityPlace 1
185 Asylum Street
Hartford, CT 06103-3495
860.275.6700 Phone
860.724.3397 Fax

September 26, 2002

Martha A. Dean, Esq.
Law Office of Martha A. Dean
77 Buckingham Street, 3rd Floor
Hartford, CT 06106

Dear Martha:

I recently made a contribution in the amount of $25.00 toward your campaign for Attorney General. Alter doing so, I learned that my law firm, Cummings & Lockwood LLC, is a party to a Professional Employment Agreement with the Office of the Attorney General, which prohibits campaign contributions to candidates for that office during the pendency of our work.

Therefore, I must respectfully request that you refund this contribution to me, but wish you luck in the campaign!

Very truly yours,

/s/ Jane Kimball Warren
Jane Kimball Warren

JKW/kam